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IN THE

Supreme Court of the United States

October Term, 1962

No. 785

ALVIN GREENE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Sought to Be Reviewed.

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IN THE

Supreme Court of the United States

October Term, 1962

No. .....

ALVIN GREENE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Judgment Sought to Be Reviewed.

Petitioner, Alvin Greene, respectfully petitions for a Writ of Certiorari to review the judgment against him in the United States District Court, in and for the Southern District of California, Central Division, and the judgment of affirmation in the Ninth Circuit Court of Appeals. The United States District Court rendered no opinion. Trial was by Court without a jury. The opinion of the Ninth Circuit Court of Appeals is as yet unreported. However, said Court only rendered a judgment and not a formal opinion. A copy of the said judgment is attached hereto, marked Appendix "A", and is hereby referred to.

A Petition for Rehearing was duly filed and was by the Court on the 9th day of January, 1963, denied. A copy of the order denying the Rehearing is attached hereto and marked Appendix "C".

Statement of Pleadings and Facts Disclosing Jurisdiction.

Defendant-Appellant, Alvin Greene, was charged in Count One of an Indictment returned in the Southern District of California of the United States District Court, Central Division, by the 1961 Grand Jury, with having sold and facilitated the sale to Hersley Jones of heroin, a narcotic drug, in violation of 21 U. S. C. 173; in Count Two of the Indictment, Appellant Greene was charged with having received, concealed and facilitated the transportation of heroin, in violation of 21 U. S. C. 173; in Count Three he was charged with having sold and facilitated the sale to Hersley Jones of cocaine, a narcotic drug, in violation of 21 U. S. C. 173; in Count Four he was charged with having received, concealed and facilitated the transportation of cocaine, in violation of 21 U. S. C. 173; in Count Five he was charged with having concealed and facilitated the concealment and transportation of cocaine, in violation of 21 U. S. C. 173; and in Count Six with having conspired with the Defendant Renfro to receive, conceal, sell and facilitate the transportation, concealment and sale of narcotic drugs which, as the defendants well knew, previously had been imported into the United States of America contrary to 21 U. S. C. 173, in violation of 21 U. S. C. 174. Various overt acts were alleged in the Indictment charging conspiracy.

We respectfully refer the Court to the Clerk's Transcript which contains a copy of the Indictment.[1]

---

[1]The record consists of Clerk's Transcript, hereinafter referred to as C. T., the Reporter's Transcript, hereinafter referred to as R. T., and the exhibits, table of which, is set out hereinafter as Appendix "B".

The Trial Court had jurisdiction under 18 U. S. C. 3231.

The defendants proceeded to trial before the Trial Court without a jury, having duly waived trial by jury.

A Motion for Judgment of Acquittal as to the Defendant Renfro was granted; the Defendant-Appellant Greene was found guilty of Counts Two, Four and Five, and sentenced to ten (10) years on each count, to run concurrently [R. T. 289, 290].

The Defendant-Appellant Greene thereafter served a Notice of Appeal and Motion for Bail Pending Appeal and Stay of Execution. The Court fixed bail pending determination of Defendant Greene's appeal [R. T. 291, 292].

Defendant Greene, having had a prior conviction, was given the minimum term [R. T. 290].

On Motion for Judgment of Acquittal as to Greene, [R. T. 163, 166, 189, 190] the Court granted the motion as to Counts One, Three and Six as to Defendant Greene [R. T. 167].

The Court thereafter withdrew the ruling made granting dismissal of Count Six as to Defendant Greene [R. T. 168].

Further argument and motions were made on the motions for judgment of acquittal and dismissal [R. T. 168, 175, 177, 181, 193, 205].

The Court thereafter again granted the Motion to Dismiss and for Judgment of Acquittal on Count Six [R. T. 212].

Additional motions were made and re-consideration by the Court, and the Court found both defendants,

Renfro and Greene, not guilty as to Count Six [R. T. 248].

A further Motion for Judgment of Acquittal as to Counts Two, Four and Five was made on behalf of Greene [R. T. 267, 272]. The Court found Greene guilty as to Counts Two, Four and Five [R. T. 278].

This Court has jurisdiction of the appeal under 28 U. S. C. 1254(1).

The Circuit Court affirmed the judgment. See judgment attached in Appendix "A". The judgment also appears in the record filed herein.

Opinion Below.

Trial in the District Court was by the Court without a jury. The Court rendered no opinion except the judgment pronounced pursuant to the verdict of guilty. The Circuit Court rendered no opinion, but pronounced a judgment, a copy of which is attached hereto, marked Exhibit "A". A copy also appears in the record forwarded by the United States Court of Appeals, Ninth Circuit.

Statutes Involved.

21 U. S. C. 173:

> "It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the pur-

pose of manufacturing heroin. All narcotics drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

"* * * *"

21 U. S. C. 174:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation to the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition may be fined not more than $20,000.

"* * * *"

The statute further provides:

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Questions Presented.

1. Was the search and seizure of the money in the Greene home unlawful?

2. Did the Court err in denying defendant-petitioner Greene's motion to suppress?

3. Was the evidence sufficient to sustain the conviction in the light of our contention that the statutory presumption created by proof of "possession" is unconstitutional and its application particularly in this case is unconstitutional?

Specifications of Error.

1. The Court erred in denying defendant's motion to suppress.

The officers entered the residence without a search warrant or warrant of arrest and without permission. Motion to suppress the evidence (money in possession of defendant and wife—given by the officers to an informant) was made at the outset of trial:

> "Mr. Parsons: If your Honor please, in the Greene-Renfro matter, there is a motion to suppress which I noticed for this morning.
>
> "The Court: Yes.
>
> "Mr. Parsons: If I might take that up briefly at first.
>
> "The Court: Yes." [R. T. 5].

Evidence of appellant in support of motion was offered [R. T. 5, 19, 38-41]; motion was denied by Court [R. T. 19]; seizure of money by officers [R. T. 28, 29].

2. The evidence is insufficient to sustain the verdicts and judgments on all the counts. The defendant-appellant Greene did not have the necessary "posses-

sion" to sustain the conviction for the concealment or transportation of illegally imported drugs. There must be possession before the defendant is required to explain the possession to the satisfaction of the trier of fact. Greene and Renfro were both acquitted of conspiracy. The possession could not be imputed to Greene. We rely upon the entire record to support this contention. (Motions for Judgment of Acquittal were made and denied [R. T. 163-166].)

3. It is our contention that the statute involved herein, and particularly its application in this case, is unconstitutional where the burden is shifted to the defendant to "explain the possession to the satisfaction of the jury."

Reasons Relied on for Allowance of the Writ.

1. The Search of Greene home was unlawful.

2. It is our contention that the statute involved herein, and particularly its application in this case, is unconstitutional.

It is our contention that this presumption which shifts the burden to the defendant is a violent one and in violation of due process of law and violates the Fifth and Fourteenth Amendments to the Constitution of the United States. It is in violation of the rule laid down in *Tot v. United States*, 319 U. S. 463, 467, 469.

Statement of Facts Pertinent to the Appeal.

The facts of the case as presented by the evidence are as follows:

Hersley Jones, a special employee for the Sheriff's Narcotics Squad, was prepared for his meeting with

the defendant Greene. He was searched by Deputy Sheriffs and found to have no narcotics on his person. He was then given money by Sergeant Cook. [R. T. 30]. Cook had received that particular currency from the Federal Bureau of Narcotics and the serial number on each bill had been recorded by him on a separate sheet of paper [R. T. 25, 26].

Hersley Jones, under observation of the deputies, proceeded to the vicinity of 2523 West Boulevard, which was the home of defendant Greene [R. T. 30, 52]. He disappeared from view on the stairway to the upper floor apartment [R. T. 30]. Twenty mniutes later he reappeared and drove to the junction of Victoria and Washington Boulevards [R. T. 31]. He was again met by the officers and searched. No narcotics were found on his person or in his vehicle, but the money that had been recorded was gone [R. T. 31, 32].

Jones stayed in the officers' company for approximately 45 minutes and then returned to Greene's house. [R. T. 32]. Outside of Greene's home at 2523 West Boulevard, Jones and Greene met. They both were in automobiles. Greene led the way in a two-tone Dodge and Jones followed [R. T. 33]. They drove to Somerset and Jefferson Streets. They stopped, Greene got out of his car and walked to an object on the street. (At the time of trial, the witness was unsure as to whether the object was a stop sign or a fire hydrant [R. T. 34]). Greene extended his hand, bent over and then reached down. A few seconds later he straightened up and turned back to Jones car. Inside, he seated himself. They remained together approximately three minutes and then parted [R. T. 34]. From the moment that Jones had left the corner of Victoria and Washington Boule-

vards, he had been under the surveillance of the police officers [R. T. 33-35].

When Greene and Jones parted, the officers followed Greene [R. T. 35]. Greene drove to an alley located behind Crenshaw Boulevard in close proximity to the corner of Crenshaw and 30th Street. In the alley itself there was an ivy-covered fence [R. T. 35]. It was along side of this fence that Greene stopped. He opened the door of his car, leaned way out and extended his hand into the ivy [R. T. 36]. He withdrew his hand and backed his car out of the alley. The officers moved up immediately after his departure. They searched the ivy and found a blue balloon in the locale where Greene had stopped and extended his hand [R. T. 36, 95]. The balloon was opened for inspection. Inside were a number of other balloons [Ex. 3A]. [R. T. 36]. The contents of these balloons were examined and appeared to have the physical characteristics of cocaine. [R. T. 136, 137]. The balloons and their contents were turned over to the Federal Bureau of Narcotics [R. T. 37]. (It was stipulated between counsel for the defense and counsel for the Government that the substance contained in the balloons was transported to the laboratory in San Francisco; that the usual tests were performed; and that the chemists would have testified that the substance was a narcotic [R. T. 19, 20].)

The time of this action was approximately 12:00 noon [R. T. 56]. When the officers searched the ivy, they were able to find no objects in the ivy other than the blue balloon [R. T. 62].

At approximately 12:00 noon, Mr. McGowan, a telephone repairman, was located on a telephone pole in the alley behind Crenshaw Boulevard in close proximity to

30th Street. He saw a man driving a two-tone Dodge enter the alley, open the door to his car, and drop something from his fingers into the ivy [R. T. 62, 64, 65]. He could not tell whether the person was colored, Mexican or Mongolian [R. T. 66].

Shortly thereafter, Deputy Gutierrez and Sergeant Cook left and met Jones, again in the vicinity of Washington and Victoria Boulevards. They received a rubber condom and a rubber balloon full of powder from him [R. T. 45, 46; Govt. Exs. 4A and 4B]. Government's Exhibits 4A and B were turned over to the Federal Bureau of Narcotics [R. T. 47].

At approximately 4:00 p.m., on November 10, 1960, one Andrew Renfro left from Greene's home located at 2523 West Boulevard. At the wheel of a late model Cadillac, he drove to the vicinity of the same alley that had earlier been visited by Mr. Greene [R. T. 74, 75, 90]. He stopped there and approximately three minutes later he was joined by Mr. Greene. Together they entered the alley and began searching the ivy [R. T. 75]. They searched the ivy from end to end, spending approximately twenty minutes at the task. At one point Mr. Greene drove his car into the alley, opened the door and leaned out extending his arm into the ivy. He then left his car and searched the ivy under his hand [R. T. 75, 76, 98]. At another time Greene dropped to his knees and groped in the ivy with his hands [R. T. 76]. Neither man was seen to pick up an object [R. T. 77].

Renfro was followed by Deputy Sheriffs and arrested. At the time of his arrest, he denied knowing Mr. Greene [R. T. 78-82]. When asked by the police for an explanation as to what Greene and he were doing in the

alley, Renfro stated that he had dropped some change and was looking for it [R. T. 100].

The Deputy Sheriffs proceeded back to Greene's house. Deputy Farrington knocked at the door and it was answered by Greene's daughter. She wanted to know who was knocking. Farrington said it's Billy [R. T. 16, 101]. The little girl received permission from her mother to open the door [R. T. 15, 16]. Soon after entering the house, Deputy Farrington informed Greene that Greene was under arrest [R. T. 102, 103]. During the arrest proceedings, Greene stated to Farrington that prior to November 10th, he had received heroin and cocaine from a person known to him as Bra Lopez [R. T. 102, 132, 133].

In connection with Greene's arrest, the police officers conducted a search of his person. An amount of currency was discovered in his pocket. He attempted to hand the money to Mrs. Greene but Deputy William Stoops stopped him. Sergeant Dennis Cook was summoned from the other room. Sergeant Cook produced the money list that he had prepared and, in the presence of Greene, he compared the serial numbers on the notes to the serial numbers on the list, finding them to be the same [R. T. 149]. Greene was taken into custody [R. T. 51].

ALVIN GREENE, defendant-appellant, was called and testified that he lived on Eighth Avenue, Los Angeles, in a four unit apartment building, which he and his wife were in the process of buying [R. T. 214].

He denied specifically the charge contained in Count Two, in that on or about November 10, 1960, in Los Angeles County, within the Southern District of California, that he knowingly and unlawfully received, con-

cealed and facilitated the concealment and transportation of heroin, a narcotic drug, which he then and there well knew had previously been imported into the United States of America contrary to 21 U. S. C. 173 [R. T. 215]. He denied the allegations in Count Four, to wit, that on or about November 10, 1960, in Los Angeles County, within the Central Division of the Southern District of California, he did knowingly and unlawfully receive, conceal and facilitate the concealment and transportation of cocaine, in violation of 21 U. S. C. 173; while knowing the same had been imported into the United States of America contrary to the provisions of said section [R. T. 215]. He denied the allegations contained in Count Five to the effect that on or about November 10, 1960, he did knowingly, unlawfully receive, conceal and facilitate the concealment and transportation of cocaine, knowing the same to have been imported into the United States of America contrary to 21 U. S. C. 173 [R. T. 216]. He denied the allegations contained in Count Six, charging a conspiracy to violate 21 U. S. C. 173, 174. He denied having any understanding, agreement or confederation with Mr. Renfro to receive, conceal, sell and facilitate the transportation and concealment of narcotic drugs [R. T. 216, 217]. He denied that he had any heroin in his possession on November 10, 1960. He denied that he had any cocaine in his possession on November 10, 1960. He stated that he had been residing at 2523 West Boulevard, Los Angeles, in November, 1960, with his wife and child; that his wife at that time was pregnant [R. T. 217]. He stated he had already testified as to the circumstances of the entry of the officers into his home, and he denied that he had been handcuffed at any time by Mr. Stoops while they were in the house.

or by any of the officers [R. T. 218]. He was told he was under arrest after they had searched the house; he was then brought to the State Building; said at the house he had a conversation with Mr. Farrington about obtaining narcotics from a man by the name of Bra Lopez; that after Farrington placed him under arrest, Farrington called him into the bathroom and he said, "I see your wife is pregnant and about to have a child. You already have one child to support," and if he didn't agree to cooperate with him and his fellow officers that he was going to make the bail so high he couldn't be able to make it. But Farrington said that if he (Greene) would give him a name, the name of a person from whom he had purchased narcotics, or whom he knew to deal in narcotics, or who had narcotics, or that he felt had narcotics, he could get him a low bail, that he would be able to get out that night or possibly the next morning [R. T. 219, 220]. After Farrington's insistence, and after Farrington assured him that he could get his bail fixed at a low figure, he gave him the name of Bra Lopez, a Mexican name. He denied that he had any transactions in narcotics with a man by the name of Bra Lopez; he didn't even know anyone by that name. He was released on bail after that conversation on $5,000.00 the following night; he was released by the United States Commissioner on $5,000.00 bail [R. T. 200]. First, he was booked for the State; he was then released by the State and then taken before the Commissioner [R. T. 220, 221].

He stated that the $150.00 was taken from his wife; he had given the money to his wife; that he had obtained the money from Hersley Jones; that it was the same Hersley Jones who was sitting there in Court [R. T. 221]. (Jones was not called by the Government

as a witness.) Greene testified he had known Jones for some time; his relations with Jones had always been friendly; they had visited at one another's homes [R. T. 221]; they had eaten together; Jones owed him between $375.00 and $400.00; it was a question of about $25.00. He told Jones to take the $25.00 off, and on this particular day Jones came to his house and paid him $150.00; he had previously loaned Jones the money [R. T. 221, 222]; that this money between he and Jones had nothing to do with narcotics [R. T. 222].

He denied he had left any narcotics in the alley as described by the officers; he had gone into the alley because Jones had told him he could obtain a fan belt for a little foreign car that he owned at the Volkswagen place that is directly on this particular corner; he went there for the purpose of getting a fan belt; the garage part of the business is directly on the alley [R. T. 223]. He backed out of the alley. He denied there was any time when he left a package by a pole, lamp pole, a telegraph pole, or anything of that sort [R. T. 224]. He was in a car with Mr. Jones on November 10th; it was the same Mr. Jones who was then sitting in Court; he had gone to Somerset and Jefferson with Jones for the purpose of buying this product for his car; the service station was supposed to have had it. He found out that this other place specialized in sports cars and that it would be cheaper and they would be more apt to have it [R. T. 224]. Mr. Jones was an automobile mechanic; he had done work on his car and other people's cars [R. T. 225].

On cross-examination, Mr. Greene admitted that he had been previously convicted of a Federal narcotics felony [R. T. 227].

Mr. Greene testified that he had heard the officers testify and he denied that in the course of his conversation with Officer Farrington, or any of the other officers, that he had stated he had purshased $1,100.00 worth of narcotics in the past few days or week [R. T. 266].

JACQUELINE GREENE testified that Mrs. Greene was her mother,; she was 12 years of age, was in the 7-B grade; she had been permitted to leave school and come to testify; she knew that she was sworn to tell the truth, she understood what it was to tell the truth, and stated she would. She testified that on November 10, 1960, she was at home with her mother, Mrs. Greene, and Mr. Greene. She recalled when the men came to the house and Mr. Greene was taken away [R. T. 38, 39]. She told the Court that she answered the door and the men told her to let them in; she asked who they were; they told her to let them in. She said, "I have to tell my mother first," and so they said, "Tell him I am Billy." She went back to tell her mother and, as she returned, the men were walking in; they did not show her any papers; they did not show her a warrant of arrest, or a search warrant. They used no words like that. They were in the house an hour or an hour and a half. They went through the house; she had to help straighten it out afterwards [R. T. 41].

Summary of Argument.

I.

The search and seizure was uniawful. The officers, Federal and State, had no search warrant, no warrant of arrest, and not sufficient cause for the entry of the Greene apartment, where he lived with his pregnant wife

and child. The child answered the door, went to tell her parents of the presence of someone at the door. When she returned the officers had entered and immediately started the search. The information they had and observations they had made did not justify the entry and search, during which they recovered money they had given to Jones, the informant. The search violated the Fourth and Fifth Amendments to the Constitution of the United States.

II.

The evidence was insufficient to sustain the convictions. The fact the officers saw Renfro and Greene together in the alley near where the officers later recovered narcotics, that they saw Renfro and Greene meet at other places, that they saw Jones, the informant, meet Greene, and later found he did not have on him the money given, was not enough. There was not sufficient possession shown to require Greene to make any explanation "satisfactory" to the trier of fact. Possession could not be "imputed" to Greene. He was acquitted of conspiracy and the sales. We rely on the complete record.

It is our contention that the statute involved herein, and particularly its application in this case, is unconstitutional. It is our contention that this presumption which shifts the burden to the defendant is a violent one and in violation of due process of law, and violates the Fifth and Fourteenth Amendments to the Constitution of the United States. It is in violation of the rule laid down in *Tot v. United States,* 319 U. S. 463, 467, 469.

ARGUMENT.

I.

The Evidence, Namely, the Marked Money, Which the Officers Claimed They Had Given to Jones, the Informant, Was Taken From Mrs. Greene and Mr. Greene in Their Residence and Was Obtained as a Result of an Unlawful Search and Seizure. The Court Erred in Denying the Defendant-Appellant's Motion to Suppress. There Was No Search Warrant; There Was No Warrant of Arrest; There Was Not Sufficient Cause for the Officers to Make the Search Which They Conducted After Having Unlawfully Entered the Home of the Greenes.

At the outset of the trial, the motion to suppress was taken up as follows:

"Mr. Parsons: If your Honor please, in the Greene-Renfro matter, there is a motion to suppress which I noticed for this morning.

"The Court: Yes.

"Mr. Parsons: If I might take that up briefly at first.

"The Court: Yes.

"Mr. Parsons: And if I might call Mr. Greene —would you take the stand please." [R. T. 5].

We have heretofore summarized all of the evidence, but briefly the Defendant Greene testified that on the day of the search he was living at 2523 West Boulevard, Los Angeles; it was an apartment upstairs with two bedrooms, a living room, a dining room, and kitchen. At that time his family consisted of his wife and a child, and a child on the way; his wife was pregnant. The child was his wife's by a former marriage;

she was about ten years of age [R. T. 6, 7]. He had raised the child since she was a year old.

It was then stipulated between counsel for the Government and the defense that at the time of the entry of the officers into this apartment they had no warrant of arrest for Mr. Greene, and neither did they have a search warrant [R. T. 7]. The search was at about 7:00 o'clock at night.

Mr. Greene first noticed the officers going from one room to the other; there were two or three in the front, and two or three in his wife's bedroom; some in his child's bedroom. The officers entered by the front door [R. T. 8]. Before entering they had given no notice; they had not said, "We are officers of the law," or that they had a warrant of arrest, or anything of that kind [R. T. 8]. He had no notice they were about to enter the house; he did not consent to their entering the house [R. T. 8, 9]; the little girl let them in; they were going through the house, walking about, looking into drawers and various places, under the tables, around the beds; he gave them no permission to search the house [R. T. 9]. He learned that among the officers there was a Federal Narcotics Agent [R. T. 9].

It was then stipulated that Federal Narcotics Officers were present during the search [R. T. 10].

One of the officers told him he would have to submit to a search, which he did; he went into the bathroom, he was told to take off his clothes and he did, including his shoes and sox; he was in the nude; the officer examined his body, his private parts, his rectum; thereafter, they went into his wife's bedroom. The officers had found nothing.

There was some discussion about money while the search was going on; they asked him to give them the money he had in his pockets; he had no money, he had given it to his wife [R. T. 10, 11]. They then told his wife to give them the money that Mr. Greene had given her. His wife handed the money that Mr. Greene had given her. His wife handed $175.00 to the officers; they took $150.00 of it and gave $25.00 back to his wife [R. T. 12]. The officers were "milling" about; they were all over the house; some of them in the bathroom, the girl's bedroom [R. T. 14]. The officers compared the $150.00 with a slip of paper; after they had done this, they told the defendant he was under arrest [R. T. 14]. After this testimony, the Court ruled as follows:

> "The Court: Well, I feel at this particular time the matter should go to trial; so I will deny the motion to suppress. You may call your first witness." [R. T. 19].

We state and urge that at the time of this ruling the evidence was in such state that it was error to deny the motion to suppress. The entry was without a search warrant, without a warrant of arrest, and no probable or reasonable cause for the arrest or search.

We are not unmindful that later in the trial evidence, which we will not again summarize here, was given by the officer to the effect that they had observed Mr. Greene meet Hersley Jones, they had observed Mr. Greene enter an alley near 30th and Crenshaw where later the officers found some narcotics in some ivy near where Mr. Greene had been seen, they had observed Mr. Renfro and Mr. Greene in the vicinity of a post, they had observed Mr. Renfro meet Mr.

Greene and get into his car, they had observed Mr. Greene talk with Hersley Jones. These facts were all received in evidence in the case on the merits.

After the motion had been denied and during the course of the trial, Jacqueline Greene, whose mother was Mrs. Greene, came from school and was permitted to testify out of order. She testified she was 12 years of age; she was in the 7-B grade; she knew that she was sworn to tell the truth, she understood what it was to tell the truth, and stated she would; that on November 10, 1960, she was at home with her mother, Mrs. Greene, and Mr. Greene; she recalled when the men came to the house and Mr. Greene was taken away [R. T. 38, 39]. She told the Court that she answered the door and the men told her to let them in; she asked who they were; they told her to let them in; she said, "I have to tell my mother first," and so they said, "Tell him I am Billy." She went back to tell her mother and as she returned the men were walking in; they did not show her any papers; they did not show her a warrant of arrest or a search warrant; they used no words like that; they were in the house an hour or an hour and a half; they went through the house; she had to help straighten it out afterwards [R. T. 41].

It is our contention that, under all the circumstances of this case, as shown by all of the evidence, the search was unlawful.

A person aggrieved by an unlawful search and seizure may move the court for the return of the property and to suppress the use in the trial of anything so obtained on the grounds that the property was illegally seized without a search warrant or without benefit of a war-

rant of arrest, or lacking reasonable cause for such search (Rule 41(e) Federal Rules of Criminal Procedure).

No search warrant having been obtained or having been used in this case, no warrant of arrest having been obtained or secured, and the search not being incident to a lawful arrest, it is our contention that the court certainly erred in denying the motion to suppress. There was no lawful reason for this search. The officers did not have before them any solid information, any reasonable or probable cause for making the search.

As was said in *Blackford v. United States*,[1] 247 F. 2d 745:

> "The Fourth and Fifth Amendments are companion pillars in the Bill of Rights structure which protects the individual against arbitrary Government invasion of personal freedom and liberty. Though their ultimate goal be the same, the amendments are the product of varied historical experience and they combat different evils. (See *Price v. Johnson*, 9 Cir. 125 Fed. 2d 806; *Wigmore on Evidence*, 3rd Ed. Vol. VIII, 2264; *Page v. United States*, 282 Fed. 2d 807).
>
> "The Fourth Amendment safeguards the right to be free from unreasonable searches and seizures; the Fifth Amendment guarantees the individual against being compelled to give evidence against himself and also assures him, under the Due Process proviso, fair and humane treatment by Federal Law Enforcement Officers. The Fourth Amend-

[1]Cited with approval in *Mosco v. United States*, 301 F. 2d 180, 186.

ment protects against invasion of the right of privacy. To effectuate its basic purpose and policy, the prohibitory language has been implemented by the Federal exclusionary rule, evidence illegally obtained in contravention of the Fourth Amendment is inadmissible in a Federal prosecution. * * *

As was said in *Johnson v. United States,* 68 S. Ct. 367, 333 U. S. 10, pages 12, 13:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

Throughout the United States the courts have become alerted to the failure of officers to obtain search warrants and the continuous unlawful arrest of people and search of their persons, cars and premises has been condemned. Only recently, in the case of *People v. Cahan,* 44 Cal. 2d 434, the Supreme Court of California, reviewing the history of searches, and particularly in this State and throughout the country, reversed the rule concerning the admission of evidence obtained by search and seizure as a wrong which had been in force in California for almost half a century. As was said in *People v. Cahan, supra,* 44 Cal. 2d 434, 446, 282 P. 2d 905:

"It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law. The end that the state seeks may be a laudable one, but it no more

justifies unlawful acts than a laudable end justifies unlawful action by any member of the public. Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty.' (See Allen, *The Wolf Case*, 45 Ill. L. Rev. 1, 20.) 'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.'"

The reasoning of *Cahan, supra*, was cited with approval in *Elkins v. United States*, 364 U. S. 216.

The Fourth and Fifth Amendments to the Constitution of the United States are plain and if Congress had seen fit to make any specific exceptions Congress would have defined the same. These amendments were ratified by the people. The Fourth Amendment was proposed September 25, 1789, ratified December 15, 1791. The Fifth Amendment[2] comes into play by reason of the use of the unlawful evidence, a man is

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[2] "AMENDMENT V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY.

(Section 1). No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[1] Proposed September 25, 1789; ratified December 15, 1791.

practically required to testify against himself when the evidence has been received or obtained over his objection and against his will.

As the Supreme Court said in *Jones v. United States*, 357 U. S. 493, 499, 2 L. Ed. 1514, 78 S. Ct. 1253:

> "Exceptions to the rule that a search must rest upon a search warrant have been jealously guarded and carefully drawn * * *"

(Cited with approval in *Mosco v. United States, supra*, 301 F. 2d 180, 187.)

The unlawful search was aggravated by breaking into the house without first complying with Section 841 of the California Penal Code, which provides as follows:

> "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, and the person to be arrested is pursued immediately after its commission or after an escape."

This subject has been studied and recently the Supreme Court of the United States reversed for failure to comply with a similar provision in force in the District of Columbia. The law is carefully reviewed in *Miller v. United States*, 357 U. S. 301, 306, 390.

In the interest of brevity, we respectfully direct the Court's attention to *Miller v. United States, supra*, and have not quoted therefrom, but it fully reviews the law on this subject.

II.

The Evidence Is Insufficient to Sustain the Verdicts and Jusdments on Any and All Counts. It Is Our Contention That the Court Relied on the Statutory Presumption Created by Proof of "Possession." It Is Our Contention That the Statute Involved Herein, and Particularly Its Application in This Case, Is Unconstitutional.

The defendant-appellant Greene did not have necessary "possession" to sustain the conviction for the possession of illegally imported drugs.

It is to be remembered that essential elements of the crimes charged against defendant, violation of 21 U. S. C. 174, are that the narcotic was brought into the United States contrary to law and that the defendant knew it.

Obviously, this is a drastic presumption and, when possession is shown, relieves the Government of proving beyond a reasonable doubt, or at all, essential elements of the crime. At the minimum, and *a priori*, such a concept in the law should throw up a danger signal and suggest to the Courts, even compel them, to go slow before allowing the Government to show *possession* on other than strong, solid proof. Anything less would mean, in effect, conviction by piling presumption on presumption, or presumption on inference and raise, we suggest, grave constitutional due process questions. (*Jackson, v. United States*, 250 F. 2d 772, 773 (C. A. D. C. 1957)). Accordingly, the words of the court in *United States v. Landry*, 257 F. 2d 425, 432 (C. A. 7 1958), are applicable here:

> "The provision which raises a presumption of guilt from the fact of unexplained possession, and

thereby in effect shifts the burden of proof to a defendant, is drastic, no doubt designed to meet a menacing situation. Congress has created a presumption upon the proof of the existence of a fact, and now the government would have the court presume the fact. There may be a case where a court would be justified in so doing but, if so, this is not it. * * *"

There is, of course, in this case no contention on the part of the Government and no evidence at all that the narcotics in any of the three counts was imported into the United States contrary to law or that, if it was, defendant knew it. The Government, therefore, perforce must rely, and is relying, on the statutory presumption created by proof of "possession."

We have summarized the evidence as against Greene and will not repeat it here, but respectfully refer the Court to our summary of the evidence. We contend it was not sufficient.

May we call the Court's attention to the case of *Hernandez v. United States*, 300 F. 2d 114 (1962), at page 121, where the Court said:

"It would be anomalous indeed if proof of a common scheme or plan, admittedly insufficient to constitute a conspiracy violative of Section 174 because proof of the requisite specific knowledge was lacking, could nonetheless provide the basis for imputing the same specific knowledge for the purposes of conviction of the substantive offenses under the same statute. The soundness of a construction which assumes that Congress intended such a result is at least highly suspect."

In the *Hernandez* case just referred to, the defendant was convicted of conspiracy. In this case, we have the opposite; Greene was found not guilty of conspiracy, and so was Renfro, the alleged co-conspirator. Greene was also found not guilty of the sales counts. Under the circumstances and in light of the law just quoted, we think the entire prosecution fails.

While no two cases are alike and insufficiency of the evidence questions are, by their nature, unique to the particular case, there are some judicial guideposts.

In *United States v. Ephemia*, 261 F. 2d 441 (C. A. 2 1958), it was held that (p. 442):

> "* * * Proof that the defendant knew Perna and rode seven blocks in the same vehicle (from which shortly after defendant left, the narcotics were delivered to the agent) with him does not appear to be enough here to prove that the defendant was Perna's 'partner' in the illegal sale of narcotics."

This matter was clearly brought to the Court's attention [R. T. 163, 166]. It was again brought to the Court's attention at [R. T. 267], where a motion for judgement of acquittal was renewed. The Court denied the renewal of the motion and found defendant Greene guilty of counts Two, Four and Five [R. T. 278].

In closing our argument on this all-important point, may we point out the similarity between the complained of section and the wording in the Federal Firearms Act, Section 2(f), which the United States Supreme

Court held a violation of due process in *Tot v. United States, supra,* 319 U. S. 463, 87 L. Ed. 1519:

> "And the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received . . . by such person in violation of this Act."

In *Tot* the court went on to question the power of Congress to pass such an Act and the rationale test to be applied thereto, determing that

> "* * * there be a rational connection between the facts proved and the fact presumed."
>
> *Tot v. United States,* 319 U. S. 463 *supra,* at p. 467.

However, if the facts proved are inconclusive, it would appear that the application of the presumption would place upon the defendant an unbearable burden of disproving his knowledge of the illegal nature of the drugs. Such is the case now before the Court.

The Court, in *Tot v. United States, supra,* further held:

> "But the due process clause of the Fifth and Fourteenth Amendments sets limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. . . . It is not too much to say that the presumptions created by the law are violent, and inconsistent with any argument drawn from experience.

"Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption."

Tot v. United States, 319 U. S. 463, *supra*, at pages 467, 469.

It is our contention that in the present case the application of the law, if the statute itself is not unconstitutional, was unconstitutional and that there was no manner of possession shown sufficient to create the presumption.

Circuit Court Decision.

The Circuit Court Decision merely affirmed the judgment of the District Court and we are, therefore, unable to comment upon it, except to say that we respectfully urge it is in error. No reasons are given for the affirmation.

Conclusion.

We respectfully urge that the petition has justice and authorities on its side, and this Court should grant Certiorari to the end that the judgment of the District Court, and the opinion of the Circuit Court of Appeals affirming said lower court judgment, be reversed.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner, Alvin Greene.

EDWARD I. GRITZ,
Of Counsel.

APPENDIX "A."

JUDGMENT.

United States Court of Appeals for the Ninth Circuit.

Alvin Greene, Appellant, vs. United States of America, Appellee. No. 18004.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered December 3, 1962

APPENDIX "B."

Index to Exhibits.

Plaintiff's Exhibits	Marked For Identification	Received In Evidence
1	RT 23	RT 27
1-A	27	27
1-B	27	27
2	36	
3	37	43
3-A	44	44; 147
4	45	48
4-A	47	48
4-B	47	48

APPENDIX "C."

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Wednesday, January 9, 1963.

Before: Barnes, Jertberg and Browning, Circuit Judges.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed December 31, 1962, and within time allowed therefor by rule of court, for a rehearing of above cause is, and hereby is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 785

ALVIN GREENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam order of the court of appeals affirming the conviction (I R. 28) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1962 (I R. 29; Pet. A. 1). A petition for rehearing was denied on January 9, 1963 (I R. 30; Pet. A. 3). The petition for a writ of certiorari was filed on February 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the verdict.

2. Whether money taken from petitioner at the time of his arrest was properly received in evidence.

STATEMENT

In the United States District Court for the Southern District of California, petitioner was convicted by the court without a jury on three counts of an indictment charging narcotic offenses (counts 2, 4 and 5), and was given the minimum sentence for a second offender, ten years on each count to run concurrently (I R. 14). Count 2 charged the transportation and concealment of .6 grams of heroin in violation of 21 U.S.C. 174; count 4 the transportation and concealment of 250 milligrams of cocaine; and count 5 the transportation and concealment of 2 grams of cocaine, all on November 10, 1960 (I R. 3, 5–6).

1. The evidence for the government may be summarized as follows:

Hersley Jones, a special employee of the office of the Sheriff of Los Angeles County (II R. 23) was searched by state officers at about 10 a.m. on November 10 and given $150 in currency, the numbers of the bills having been recorded (II R. 25, 30). Jones, followed by deputy sheriffs, drove to the vicinity of the apartment house where petitioner lived, got out of the car and walked toward the house (II R. 30). About 20 minutes later Jones reappeared and was followed to a place about a quarter of a mile away. When he was searched, the listed money was not on his person or in his car (II R. 30–32). Three quarters of an hour later surveilling officers saw Jones go back to the apartment house, and saw petitioner get into his own car and drive away, followed by Jones (II R. 32–34). After traveling some distance, both cars stopped. Petitioner walked up to a hydrant or stop

sign, bent down, then went to Jones' car, sat there for two to four minutes, returned to his own car and drove off (II R. 34). Jones subsequently met the officers and gave them a package (II R. 45–47) which contained heroin and cocaine (II R. 19–20). This was the basis of counts two and four. The money given to Jones was found on petitioner's person after his arrest (II R. 27–28).

Petitioner was followed after he left Jones and was seen to stop in an alley which bordered an ivy-covered fence. Petitoner leaned out and made a motion with his left hand toward the ivy. After petitioner drove away the agents found in the ivy a blue balloon containing smaller balloons, each of which held a crystalline substance. No other object was seen in the ivy (II R. 36, 71–72, 94–95; III R. 251, 253–254, 259).[1] The substance was cocaine (II R. 19–20). This incident was the basis of count 5.

At 4:30 that afternoon Mr. Renfro (a co-defendant charged in a conspiracy count on which both were acquitted) was seen with petitioner at the alley searching for something in the ivy. Petitioner made a thorough search on foot and at one point got into his car, drove into the alley, leaned out with his hand extended and then ruffled the ivy, duplicating his actions of a few hours earlier (II R. 75–76, 97–98).

Later the two drove in their respective cars to another alley where petitioner got out, picked up a white object near a telephone pole and returned to his

[1] A telephone repairman saw someone drop something in the ivy at the time and place described by the officers but could not identify the individual (II R. 64–66).

car. Both cars then drove off and stopped. Renfro went to petitioner's car for a moment and walked back to his own car, discarding a white object. After he drove off, Refro was stopped and arrested (II R. 77–80, 98–100).

Officers, including a federal agent and deputy sheriff William Farrington, then went to petitioner's house and arrested him (II R. 101–102). Petitioner said he had previously purchased $1100 worth of cocaine and $250 worth of heroin from one Lopez (II R. 102).

2. Before trial petitioner made a motion to suppress evidence of the money taken at the time of his arrest (I R. 10–12), on the ground that the officers acted without a warrant. At the hearing petitioner testified as to the manner of arrest and the court denied the motion (R. II 5–19). Further testimony as to probable cause and the manner of arrest was developed at the trial.

The evidence bearing on probable cause has already been detailed. On the question of arrest and search, officer Farrington testified that petitioner's stepdaughter answered his knock through the window and he asked if Alvin (petitioner) was home. When she said yes, he told her to tell petitioner Billy Farrington was there. After she did so, he heard petitioner say, "Tell him to come on in." (II R. 101, 111.) Petitioner was told he was under arrest and the house was searched (II R. 102, III R. 148–149). Money which petitioner tried to give to his wife was compared with the list the officers had prepared. The officers kept the listed bills (II R. 27–28, III R. 149).

Petitioner testified, both on the motion to suppress and at the trial, that the officers entered the house without permission and searched it before they arrested him, that they took the money he had previously given to his wife and arrested him after they had compared the numbers of the bills with their list (II R. 9–18; III R. 218, 221).

Petitioner's stepdaughter testified that she answered the door and was told by an officer to let them in. She said she would have to tell her mother and the officer said, "Tell him I'm Billy." She told petitioner that Billy was at the door. When she got back the officers were walking in (II R. 40). Petitioner admitted he knew deputy sheriff "Billy" Farrington (II R. 15).

ARGUMENT

Count 5, based on the cocaine found in the balloon discovered in the ivy, will alone support petitioner's sentence. *Lawn* v. *United States*, 355 U.S. 339, 359. Accordingly, the issues raised by the motion to suppress, challenging the use of the currency taken at the time of petitioner's arrest, are not necessarily before the Court. The money was tied to the sales to Jones which are the basis of counts 2 and 4; in no way is it related to count 5.

1. The sufficiency of the evidence to support the conviction is evident from the facts summarized in the Statement. With particular reference to count 5, the trier of fact, on the evidence, was fully justified in concluding beyond a reasonable doubt that the cocaine found in the ivy had been in petitioner's possession and had been dropped there by him just

before it was picked up by the officers. This conclusion was reinforced by the observations of petitioner and Renfro in searching in the ivy later in the afternoon.

Petitioner's attack on the presumption arising from possession is without merit. The validity of the presumption was sustained more than thirty years ago, *Yee Hem* v. *United States*, 268 U.S. 178, and has since been recognized by this Court. *Roviaro* v. *United States*, 353 U.S. 53; *Harris* v. *United States*, 359 U.S. 19. See also the government's brief in opposition in *Jennings* v. *United States*, No. 840 Misc., this Term.

2. The motion to suppress (assuming any issue with respect thereto is presented) was properly denied. The observations of the officers constituted probable cause for the arrest of petitioner. Under both state (California Penal Code, Sec. 836) and federal law (26 U.S.C. 7607), the officers and agents had authority to arrest without a warrant on probable cause to believe that the person arrested had committed an offense against the narcotic laws. There was no entry by force. Concededly petitioner's stepdaughter opened the door for the officers. The trier of fact had the right to credit Farrington's testimony that Farrington told the daughter to tell petitioner that "Billy" was there and that he entered when he heard petitioner tell the girl to let him in. There was ample evidence that petitioner was told he was under arrest before the money was taken.

As to the procedure on the motion to suppress, in a trial before the court without a jury, the court was

fully justified in deferring its decision until after the facts were developed at the trial so that there would be no necessity to hear twice the evidence as to probable cause and the manner of arrest.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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BEATRICE ROSENBERG,
Attorney.

FEBRUARY 1963.

U. S. GOVERNMENT PRINTING OFFICE 1963